THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 7th November, 2013

+ ITA 327/2012, ITA 330/2012, ITA 338/2012 & ITA 339/2012

DIT-I, INTERNATIONAL TAXATION .....Petitioner

versus

ALCATEL LUCENT USA, INC. .....Respondent

+ ITA 328/2012, ITA 329/2012, ITA 336/2012, ITA 337/2012 & ITA 340/2012

DIT-I, INTERNATIONAL TAXATION .....Petitioner

versus

ALCATEL LUCENT WORLD SERVICES INC ....Respondent

Advocates who appeared in this case:

For the Petitioner : Mr N. P. Sahni, Advocate.
For the Respondent : Mr M. S. Syali, Sr. Advocate with Mr Mayank Nagi, Ms Husnal Syali, Advocates.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE R.V.EASWAR

JUDGMENT

R.V.EASWAR, J

1. These are nine appeals filed by the Revenue under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'). They are directed against the common order passed by the Income Tax Appellate

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Tribunal on 21.10.2011 in ITA Nos. 3821 to 3824/de1/2011 and ITA Nos. 3825 to 3829/de1/2011. There are two respondents in these appeals (i) Alcatel Lucent USA, INC. and (ii) Alcatel Lucent World Services INC. In respect of the first assessee, the assessment years involved are 2004-05 to 2007-08 and in respect of the second assessee, the assessment years involved are 2004-05 to 2008-09.

2. On 10th July, 2012 this court framed the following substantial question of law, common to all the appeals: -

> *"Whether in the facts and circumstances of this case the Tribunal fell into error in holding that the assessee was not liable to pay interest in terms of Section 234B of the Income Tax Act?"*

3. ITA No.327 of 2012 was taken as the lead matter by consent. The facts relating to this appeal may be noted in brief. The assessee-Alcatel Lucent USA, INC., is a tax-resident of USA and is part of the Alcatel Lucent Group. It supplied telecom equipments to customers in India in the year under consideration, which is the FYE 31.03.2006, relevant to the assessment year 2007-08. It would appear that the aforesaid group started its operations in India in 1982 in terms of an agreement with ITI Limited, a public sector undertaking which was engaged in the manufacture of telephones. Thereafter a joint venture was established

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with C-DOT at Chennai, besides establishing a research centre at Bangalore. On 27.02.2009, a survey under Section 133 A of the Act was conducted in the premises of Alcatel Lucent India Ltd., which is the Indian subsidiary and which according to the income tax authorities constituted the permanent establishment (PE) of the assessee in India. The Indian subsidiary provided marketing support services to the assessees. Based on the materials found during the survey, the assessing officer in charge of the assessment of Alcatel - Lucent France, which was another flagship company belonging to the same group, concluded that the assessee had a PE in India in terms of the Double Taxation Avoidance Agreement between India and US and was liable to tax in India on the income earned therein. Based on these findings of the assessing officer who was in charge of the assessment of Alcatel - Lucent France, the assessing officer who was in charge of the assessment of the present assessee issued notices under Section 148 of the Act for the assessment years 2004-05 to 2007-08. It may be added that similar reassessment notices under Section 148 were also issued to the other assessee concerned in the present appeals, i.e. Alcatel Lucent World Services INC. for the very same assessment years; in addition, for the assessment year 2008-09, a notice under Section 142 (1) was also

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issued to that company. Apparently, these notices were issued on the ground that income chargeable to tax in India had escaped assessment.

4. In response, both the assessees herein filed returns of income for all the assessment years declaring "nil" income. In the returns, the following note was appended, explaining why the assessee took the position that it was not liable to tax in India:

> *"a) Alcatel-Lucent USA Inc. ("Alcatel Lucent Inc." or the Company") is a company incorporated in USA. It is a tax resident of USA and entitled to be governed by the provisions of the Double Taxation Avoidance Agreement between India and USA ("the DTAA').*
>
> *b) Alcatel Lucent Inc. does not have any office, premises or other place of business in India. During the year under consideration, Alcatel Lucent Inc. supplied certain goods I equipment to Indian customers engaged in telecom. business. The sales of these goods were made from outside of India. The payments for the same were also received outside of India. In view of above, the Company does not have any taxable presence in India and hence no* ***portion*** *of its business profits is taxable in India.*
>
> *c) The present return of income is being filed under protest and in pursuance to the notice issued under section 148 of the Indian Income-tax Act, 1961 ("the ;Act") by the Assistant Director of Income-tax, Circle -1(1), International Taxation, Drum Shape Building, I.P. Estate, New Delhi. The return is being filed*

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only with a view to comply with the said notice. The act of such compliance is not an admission of any sorts that Alcatel Lucent Inc. had any taxable income in India for the year under consideration. The return is being filed without prejudice to the Company's contention that the notice issued to it is without jurisdiction and bad in law. The return is being filed without prejudice to the legal rights the Company has under law to contest the above notice, including the right to challenge the extra territorial application of the Act in the present case. The act of filing the return in compliance to the above notice should not be construed as Alcatel Lucent Inc. acceding to the jurisdiction of the Indian Tax Authorities in any, manner whatsoever."

5. The assessing officer however did not accept the assessee's stand and in the assessment order passed on 23.03.2010 attributed 2.5% of the sale proceeds of the hardware as profit attributable to the PE in India, which came to ₹21,02,58,238/- for the assessment year 2007-08. Similar re-assessments were made in all the years in respect of both the assessees. In the re-assessment order, in addition to the aforesaid income, the assessing officer also directed that interest under Sections 234A, 234B and 234C shall be charged. Demand notices were accordingly issued.

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6. Appeals were taken by the assessee in respect of all the assessment years before the CIT (Appeals). Three grounds were taken in the appeals. The first ground was that the assessing officer erred in computing the income of the assessee as was done in the re-assessment orders; the second ground was that on the facts and in the circumstances of the case and in law, the assessing officer erred in levying interest under Section 234B *"in view of the fact that the entire consideration in the hands of appellant was subject to deduction of tax at source under Section 195 of the Act";* the third ground was against the initiation of penalty proceedings for alleged concealment of income.

7. Before the CIT (Appeals), the assessee did not press the appeals in respect of the first ground, i.e. the ground against the computation of the income attributable to the PE in India. Only ground No.2 which was directed against the levy of interest under Section 234B of the Act was pressed, the contention being that it was the liability of the purchasers of the telecom equipment in India to deduct income tax at the applicable rates from the remittance made to the assessee under Section 195 of the Act, that in view of the language employed in Section 209(1)(d) the assessee was entitled to take credit for the tax which was "deductible" at

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source while computing its liability for paying advance tax and if the amount of tax so "deductible" by the payer in India is given credit, there was no amount of advance tax payable by the assessee, and if that is so there was no question of the assessee being liable to pay any interest under Section 234B. Several authorities were cited before the CIT (Appeals) in support of the above contention including the judgment of a Division Bench of this court in ***Director of Income Tax vs. Jacabs Civil Incorporated and Mitsubishi Corporation*** **: (2010) 330 ITR 578.** It was submitted before the CIT (Appeals) that in this judgment, this court held that Section 195 places an obligation on the payer to deduct tax at source at the rates in force from the payments made and if the payer has defaulted in deducting the tax, it was open to the Income Tax Department to take action against the payer under Section 201 of the Act, but no action can be taken for recovery of the interest under Section 234B from the non-resident assessee. It was further held in this decision that the non-resident will, no doubt, be liable to pay the income tax on the income assessed upon it, but it cannot be held liable for payment of any advance tax thereon if the tax deductible by the payer in India exceeds the amount of advance tax payable on the estimated income. It was further held that the position would be so even if the income tax

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was not in fact deducted from the remittance because Section 209 (1)(d) of the Act permitted the non-resident assessee to take credit, while computing its advance tax liability, for the amount of income tax that was "deductible" from the remittance, though not actually deducted. It was furthermore held in the judgment that once it was found that the liability was that of the payer under Section 201 of the Income Tax Act, which permitted recovery of the tax from the payer by treating him as an assessee in default and also recovery of interest under Section 201 (1A) for the default in not deducting the tax, there can be no liability fastened upon the non-resident assessee to pay interest under Section 234B.

8. The CIT (Appeals) accepted the contention of the assessee based on the language employed in Section 209(1)(d) read with Section 195 of the Act and on the basis of the judgment cited above and held as follows:

> *"In this case, it is undisputed that the tax on the entire income received by the appellant was required to be deducted at appropriate rates by the respective payers u/s 195(2) of the Income-tax Act. Had the payer made the deduction of tax at the appropriate rate, the net tax payable by the appellant would have been Nil. Therefore, it is clear that there was no liability to pay advance tax by the appellant. I have carefully gone through the various judgments relied upon by the appellant in this regard. The*

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jurisdictional High court i.e. Hon'ble Delhi High Court, in recent judgment dated 30th August 2010 in the case of ***Director of Income-tax vs. Jacabs Civil Incorporated/ Mitsubishi Corporation*** **:** ***(2010) 330 ITR 578 (Delhi),*** *has held that section 195 puts an obligation on the payer, i.e., any person responsible for paying any tax resident, to deduct tax at source at the rates in force from such payments and if payer has defaulted in deducting tax at source, the department can, take action against the payer under the provisions of section 201. In such a case, the non-resident is liable to pay tax but there is no question of payment of advance-tax and, therefore, it cannot be held liable to pay interest u/s 234B on account of default of the payer in deducting tax source from the payments made to the appellant."*

9. The Revenue carried the matter in appeal before the Income Tax Appellate Tribunal. All the nine appeals, four in the case of Alcatel Lucent USA Inc. and five in the case of Alcatel Lucent World Services Inc. were disposed of by the Tribunal by a common order passed on 21.10.2011. Before the Tribunal the contention taken on behalf of the Revenue was that at the time of the receipt of monies from India, the assessee had taken the plea that it did not have a PE in India and therefore the payment was not chargeable to tax in India and consequently the provisions of Section 195 were not applicable, whereas in the appeals before the CIT (Appeals) a contradictory stand was taken by the assessee, by accepting the fact that it had a PE in India and admitting that the income earned in India was

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chargeable to tax. Nevertheless, it was pointed out by the revenue, the assessee still contended that no interest under Section 234 B can be levied because if the entire income was subject to tax in India the consequence would be that it was the responsibility of the payer to deduct tax and if he has not done so, the remedy of the Income Tax Department lies against him in terms of Section 201 and not against the assessee under Section 234B. The Revenue seriously contested this contradictory stand taken by the assessee before the CIT (Appeals) and submitted before the Tribunal that the assessee should not be allowed to take such a plea. It was pointed out that consistent with the stand taken by the assessee originally in the return filed in response to the notice under Section 148, it would have told the Indian payer that it did not have any PE in India and therefore no tax should be deducted from the remittance; and having said so and led the payers in India to make the entire payment of the purchase price of the equipments without any deduction of tax in terms of Section 195, it is now not open to the assessee, merely because at the first appellate stage it did not choose to contest the assessment of the income attributable to the Indian PE, to turn around and say that now that it has accepted the liability to pay tax on its Indian income, it was

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for the Indian payers to have deducted the tax and if they had not done so, the assessee cannot be held liable for the interest. It was further pointed out by the Revenue that consequent to the amendment made to Section 201 by the Finance Act, 2012 with effect from 01.04.2012, time limit of four years was set for taking action under Section 201 and therefore no action can be taken against the payers for the years under consideration since the aforesaid time limit had already expired. It was submitted that when this court decided the case of ***Jacabs Civil Incorporated and Mitsubishi Corporation (supra)*** there was no time limit for taking action against the payer. Now that the action against the payer has become time barred, the basis of the judgment has been removed, with the result that the assessee would be liable for payment of the interest under Section 234B.

10. These submissions of the Revenue did not find favour with the Tribunal. It held that undisputedly the tax on the income received by the assessee was required to be deducted at source at the applicable rates by the respective payers under Section 195 of the Act. In terms of Section 209(1)(d), the income tax calculated on the estimated income of the assessee is to be reduced by the amount of tax which would

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be deductible at source. No tax was deducted by the payers, for which the assessees cannot be faulted. However, the assessee can take credit for the tax which ought to have been deducted by the payers because the requirement of Section 209(1)(d) was that the tax "deductible" could be taken credit for and it was not necessary that the tax should have been actually deducted. In addition to this reasoning based on the language of Section 209(1)(d), the Tribunal also held, with reference to the argument of the Revenue that the assessee had represented to the payers that the income was not liable to deduction of tax at source (as there was no PE), that *"no such material in support of this plea has been placed before us nor any such facts and circumstances emerged from the impugned orders".*

11. The answer of the Tribunal to the argument of the Revenue based on the time limit set by the amendment made to Section 201 with effect from 01.04.2010 was that in terms of Section 40(a)(i), inserted with effect from 01.04.1989, certain types of payments which are claimed as a deduction by the payer would not get the benefit of deduction if the tax was not deducted at source, if such payments were made outside India. According to the Tribunal this provision ensured effective compliance of

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Section 195 of the Act relating to tax deduction at source. The Tribunal eventually found that the controversy was covered by the judgment of this court in *Jacabs Civil Incorporated (supra)* and accordingly confirmed the decision of the CIT (Appeals) that the assessee was not liable to pay any interest under Section 234B of the Act.

12. According to the learned standing counsel for the income tax department, the approach of the Tribunal is seriously flawed. According to him the legal position that the non-resident assessee is entitled to take credit, while computing its advance tax liability, for the tax which was "deductible" though not actually deducted, within the meaning of Section 209(1)(d) is not applicable to the facts of the present case. In the present case, the assessee initially disputed its liability to pay tax in India and articulated its stand in the note appended to the returns filed in response to notices issued under Section 148, and even filed appeals against the reassessments; but before the CIT (Appeals) it gave up the claim that it was not liable to tax in India and pressed its claim only to the extent of its liability to pay interest under Section 234B. It is submitted that this factual position is in complete contrast to the facts before this Court in ***Jacabs (supra)*** where the assessee admitted its liability to pay tax on the

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Indian income in the return filed by it and the payer was, therefore, found clearly liable to deduct tax. It was in those circumstances that this Court held that the tax was "deductible" and the non-resident assessee can rightly take credit for the same, even though the tax was not actually deducted, while computing its advance tax liability, According to the learned standing counsel, it is not open to the non-resident assessee in the present case to say that though it was not liable to pay tax on its Indian income, but still the Indian telecom equipment dealer ought to have deducted the tax under Section 195 of the Act. According to him, this would be a contradictory stand which cannot be accepted at all.

13. The learned counsel for the assessee *inter alia* made the following submissions: -

(a) The liability of the payer of the monies to the non-resident to deduct tax from the payment under Section 195(1) is absolute and does not depend on the stand taken by the non-resident assessee with regard to the question whether or not the amount remitted gives rise to tax liability under the Act in India. In case the payer has any doubt about the taxability of the sum remitted by him in the hands of the non-resident assessee, it is open to him to make an

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application under Section 195(2) to the appropriate authority to have the income portion of the sum determined for the purpose of deduction of tax;

(b) If the payer fails to deduct the tax, his liability to make good the payment along with interest is governed by Section 201(1) and (1A). This liability is absolute and exhaustive of the remedy available to the revenue;

(c) Section 201(1A) which imposes the liability upon the payer to pay interest on the amount which ought to have deducted from the sum paid to the non-resident and Section 234B which levies interest on the non-resident assessee for non-payment of advance tax are mutually exclusive and operate on different fact-situations. They are not alternative courses in the sense that the department can choose to proceed under the one or the other;

(d) There is no concession given by Section 201 in the sense that no plea of reasonable cause for the failure to deduct the tax can be entertained under that Section;

(e) The proviso to Section 209(1) inserted by the Finance Act, 2012 amending the sub-section to provide that the non-resident

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assessee can take credit only for the amount of tax actually deducted by the payer while computing his advance tax liability was inserted only w. e. f. 01.04.2012 and would apply only from the assessment year 2012-13. The amendment is not clarificatory or explanatory and has been made expressly prospective.

14. In his rejoinder, the learned standing counsel for the income tax department submitted that the definition of the expression "assessed tax" appearing in Section 215(5) is different from the definition of the said expression appearing in Explanation 1 below Section 234B and this makes a crucial difference in the assessee's case. He pointed out that under the aforesaid Explanation, as it stood both before being amended by the Finance Act, 2006 w. e. f. 01.04.2007 and thereafter, only the tax actually deducted at source is permitted to be deducted from the tax on the total income determined under the regular assessment and if no tax is deducted at source, no such adjustment from the tax on the total income assessed is permissible. In other words, his contention was that the Explanation below Section 234B overrides the provisions of Section 209(1)(d) and, therefore, the benefit of reducing the tax on the estimated income by the tax which was "deductible", but not actually deducted, was not available to the non-resident assessee. , He further pointed out

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that in the present case the payer knew that no income was chargeable to tax in the hands of the non-resident assessee as the sum remitted represented the purchase price of the telecom equipments and, therefore, advisedly did not deduct any tax from the remittance. When the assessee accepted its tax liability in India, it follows that it would also be liable to pay interest under Section 234B for failure to pay the advance tax and such a consequence cannot be avoided, once the tax liability is admitted. He further submitted that the decision of this Court in ***Jacabs (supra)*** did not deal with all the factual situations possible, because in that case the assessee admitted the taxable income even in the return and the payer was also found liable to deduct tax. According to him, the present case stands on a completely different footing.

15. Both the sides filed written submissions which have also been taken into consideration while disposing of the appeals.

16. In the light of the judgment of this Court in ***Jacabs (supra)***, the interpretation to be placed on Section 209(1)(d) in juxtaposition with Section 195(1) is that which is canvassed before us on behalf of the assessee. However, we find merit in the submission of the learned standing counsel for the income tax department that on the facts of the present case, the aforesaid legal position cannot be applied. As pointed

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out by him, in the case of ***Jacabs (supra)*** the assessee filed its return of income admitting tax liability on income of ₹296,83,278/-. On this income it did not pay advance tax on the due dates. The assessing officer proceeded to charge interest under Section 234B, overruling the assessees objection that tax was "deductible" by the National Highway Authority of India for whom the assessee was executing the projects. The plea was, however, accepted by the CIT (Appeals) and the Income Tax Appellate Tribunal. It was in those facts that this Court held that since it was the duty of NHAI to deduct tax under Section 195(1) from the payments made to the assessee, and even though no tax was actually deducted and paid by the NHAI, the assessee was entitled to take credit for the tax which was "deductible" by the NHAI while computing its advance tax liability. In the present case, the factual position is quite different. Herein the assessee did not admit any income in the returns. In the note appended to the return (which we have extracted earlier) the assessee denied its liability to be taxed in India on the ground that it had no PE in India. The assessee also pointed out that no income from the supply of telecom equipment to the Indian dealers arose in India since all sales were made from outside India (in the USA). The assessing officer did not accept the claim made in the note and

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proceeded to assess the assessee in respect of the income arising in India from the supply of the telecom equipment on estimate basis. The assessment was not accepted and appeals were filed but in the appeals the assessee did not press the ground of appeal against the computation of the income, but pressed the appeals only against the levy of interest under Section 234B. Thus it was at the stage of the CIT (Appeals) that the assessee accepted its tax liability in India. It would be incongruous, as pointed out on behalf of the revenue, to hold that even though the assessee did not admit any tax liability in India while filing the return and even up to the stage of first appeal, and correspondingly the payers were also not liable to deduct tax under Section 195(1), still it can take credit for the tax "deductible", though not deducted, by the Indian payers from the remittance made to the assessee. In our opinion this factual position makes a crucial difference to the legal position also and, therefore, the benefit of the decision of this Court in ***Jacabs (supra)*** cannot be extended to the assessee.

17. The learned counsel for the assessee, however, put forth two arguments in rebuttal. The first is that this Court also decided the case of ***Mitsubishi Corporation*** in the same judgment dated 30th August, 2010 by which ***Jacabs (supra)*** was decided. In this behalf, he drew our attention

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to the first paragraph of the judgment in which this Court observed that except in ITA No.491/2008, in all other appeals, M/s. Mitsubishi Corporation was the assessee-respondent. However, the issue in all the cases was the same i.e. chargeability of interest under Section 234B. While narrating the facts, this Court took note of the facts appearing in ITA No.491/2008 which related to ***Jacabs (supra)***. The Court proceeded to observe that "*under similar circumstances, in the assessment orders passed for the various assessment years in the case of M/s. Mitsubishi Corporation, interest charged under Section 234B of the Act has been deleted by the Tribunal*". On the basis of these observations, the learned counsel for the assessee submitted that the facts of Jacabs and Mitsubishi Corporation were the same.

18. In order to ascertain the correct position, we summoned the file of ITA No.229/2010 in ***Director of Income Tax vs. Mitsubishi Corporation.*** The order of the Tribunal is dated 23.06.2009.

Paragraph 2 of the said order reads as under: -

> *"2. The appellant Mitsubishi Corporation is a Japanese non-resident company and it had been carrying on its activities through its liaison office in New Delhi and offices in other cities called "divisions". It claimed that it has no income taxable in India. The department, however, carried survey and recorded statement of General Managers in India and, on the basis of documents recovered in survey,*

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held that a portion of income of the assessee attributable to Indian activities was liable to be taxed in India under Article 4, 5 and 6 of DTAA between India and Japan and under provisions of the Indian Income Tax Act. Initially, the assessee resisted such assessment but ultimately accepted that income taken by the AO was rightly taxed. The quantum of assessments was not challenged before the ld CIT(A). The challenge was restricted to the levy of interest u/s 234B of the Act. Before the ld. CIT(A), assessee placed reliance on decision of ITAT in assessee's own case for AY 2005-06 wherein similar interest u/s 234B imposed on the assessee was deleted vide order in ITA No.848/D/08 dated 08.08.2008 after a detailed discussion. As a matter of judicial discipline, the ld. CIT (A) should have followed order of ITAT given in identical circumstances and deleted theinterest levied, more particularly, when decision of Hon'ble Supreme Court in the case of Union of India and others vs. Kamalakshi Finance Corporation Ltd., [1992 AIR 711 (SC)] and of Hon'ble Jurisdictional High Court (Del) in case of Nokia Corporation v. Director of Income Tax (International Taxation) (2007) 292 ITR 22 were brought to his notice and placed on record. He also noted that judicial discipline required that subordinate authorities should follow decision of higher authorities. He, however, acted just the opposite."

(underlining ours)

19. It is thus noticed that the facts of ***Mitsubishi Corporation*** are different from the facts of Jacabs and are akin to the facts of the present case. Therefore, the observation of this Court in ***Jacabs case (supra)*** that in the case of ***Mitsubishi Corporation***, interest was charged under Section 234B under circumstances similar to those obtaining in Jacabs case appears, with respect, to be inaccurate. The facts of the present

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case being similar to those of ***Mitsubishi Corporation***, have to be, therefore, dealt with separately. This Court would appear to have proceeded on the assumption that the facts of ***Mitsubishi Corporation*** were similar to those of ***Jacabs (supra)***. Since it is not so, different considerations will have to be applied and the legal position laid down in Jacabs case cannot automatically be invoked and applied to the present case.

20. The other argument on behalf of the assessee that the liability of the payer under Section 201 is absolutely different from the liability of the non-resident assessee under Section 234B need not be examined and for the purpose of the present case it would not make any difference, on account of the peculiar facts of the present case. It may be recalled that the argument put forth by the revenue before the Income Tax Appellate Tribunal was that at the time of the receipt of monies from India, the assessee took the plea that it did not have any PE in India and, therefore, the payment was not chargeable to tax in India, with the consequence that Section 195(1) was not applicable, whereas in the appeals before the CIT (Appeals), a contradictory stand was adopted by the assessee, by accepting the fact that it had a PE in India and by

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admitting that the income earned in India was chargeable to tax. It was further argued by the revenue that such a contradictory plea cannot be permitted to be taken by the assessee. It was pointed out that consistent with the stand taken in the return, the assessee would have told the Indian payer that no tax should be deducted from the remittance and it was, therefore, not open to the assessee, merely because at the first appeal stage it chose not to contest the assessment of the income attributable to the Indian PE, to turn around and say that since it has now accepted its liability to pay tax on the Indian income, it was for the Indian payers to have deducted the tax and if they had not done so the assessee cannot be held liable for the interest. This argument of the revenue was rejected by the Tribunal on the ground that there was no material in support of the plea that the assessee represented to the Indian payers not to deduct tax, nor did any such facts or circumstances emerged from the impugned orders.

21. We are unable to uphold this part of the decision of the Tribunal. It must be remembered that in the note appended to the return the assessee was quite categorical in denying its liability to be assessed in India. It relied on the double taxation avoidance agreement between

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India and USA and pointed out that there was no permanent establishment in India. It further stated that the telecom equipments were sold outside India and the payments were also received outside India and thus the assessee did not have any taxable presence in India so as to be liable for tax on its Indian income. If this was the stand of the assessee, it is not impermissible or unreasonable to visualise a situation where, the assessee would have represented to its Indian telecom dealers not to deduct tax from the remittances made to it. On the contrary it would be surprising if the assessee did not make any such representation; such a representation would only be consistent with the assessee's stand regarding its tax liability in India. Moreover, no purpose would have been served by the assessee taking such a categorical stand regarding its tax liability in India and at the same time suffering tax deduction under Section 195(1). Therefore, in our opinion, even though there may not be any positive or direct evidence to show that the assessee did make a representation to its Indian telecom dealers not to deduct tax from the remittances, such a representation or informal communication of the request can be reasonably inferred or presumed. The Tribunal ought to have accorded due weightage to the strong possibility or probability of such a request having been made by the assessee to the Indian payers

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since otherwise the denial of its tax liability on its Indian income would have served little purpose for the assessee.

22. In ***Esthuri Aswathiah vs. CIT, Mysore*** **: (1967) 66 ITR 478,** a three Judge bench of the Supreme Court, while expounding on the functions of the Tribunal and its duties while disposing of the appeals, had this to say:

> *"The function of the Tribunal in hearing an appeal is purely judicial. It is under a duty to decide all questions of fact and law raised in the appeal before it: for that purpose it must consider whether on the materials relied upon by the assessee his plea is made out. Conclusive proof of the claim is not predicated: the Tribunal may act upon probabilities, and presumptions may supply gaps in the evidence which may not, on account of delay or the nature of the transactions or for other reasons, be supplied from independent sources. But the Tribunal cannot make arbitrary decisions: it cannot found its judgment on conjectures, surmises or speculation. Between the claims of the public revenue and of the taxpayers, the Tribunal must maintain a judicial balance.".*
>
> (underlining ours)

23. The Tribunal, keeping in mind the above observations, underlined by us, ought to have drawn the inference that the Indian payers did not deduct the tax under Section 195(1) because of the request made by the

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assessee, consistent with its stand that it was not liable to be taxed in India.

24. The learned counsel for the assessee submitted in the course of his arguments that the assessee and the Indian telecom equipment dealers cannot contract out of the statute and, therefore, even if such an arrangement had been made between them, it cannot be given effect to and the liability of the Indian payer under Section 195(1) has to be strictly enforced. In other words, it was his contention that the Indian payers ought not to have paid any heed, and should have acted strictly in accordance with Sections 195(1), even assuming, but not admitting that there was such a request from the assessee. Taking a practical view of the matter, it is difficult to see how the Indian payers could have resisted the request which, according to our inference, was made by the assessee to them not to deduct tax from the remittances. The Indian payers have to keep in mind the future business prospects and it was necessary for them to keep the assessee in good humour so that the business relationship remains profitable for them. They would have been in no position to resist the request. Moreover, since the sales were claimed to have been concluded outside India, again it would be a fair and reasonable inference to be drawn that the Indian dealers would have had an interface with the

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assessee in USA while concluding the sale contracts and on such an occasion it is normal for the parties to finalise all aspects touching on their relationship including the tax compliances. It should also be remembered that no reason whatsoever has been given by the assessee as to why it did not press its appeals before the CIT (Appeals) on the question of liability to tax on its Indian income.

25. In the light of the view taken by us on the facts of the present case, we do not consider it necessary to discuss the plethora of authorities cited by both the sides. It is, however, necessary to just highlight one aspect of the matter. This was in fact pointed out on behalf of the revenue also. It is open to the assessee to deny its liability to tax in India on whatever grounds it thinks fit and proper. Having denied its tax liability, it seems unfair on the part of the assessee to expect the Indian payers to deduct tax from the remittances. It is also open to the assessee to change its stand at the first appellate stage and submit to the assessment of the income. When it does so, all consequences under the Act follow, including its liability to pay interest under Section 234B since it would not have paid any advance tax. Such liabilities would arise right from the time when the income was earned. Advance tax was introduced as a PAYE Scheme – "pay as you earn". It is not open to

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the assessee, after accepting the assessment at the first appellate stage to claim that the Indian payers ought to have deducted the tax irrespective of the fact that the assessee itself claimed the Indian income to be not taxable. We can understand an assessee who admits its tax liability right from the beginning to contend that it was the responsibility of the payers to deduct the tax and if they did not, even then the tax which ought to have been deducted by them should be set off against the assessee's advance tax liabilities. That is the type of case dealt with in the decision of this Court in Jacabs (supra). We were not referred to a single case where on facts similar to the case of the assessee before us, the Court took the view that no interest under Section 234B was chargeable. The case of ***Mitsubishi Corporation*** decided along with the case of Jacabs, was on facts similar to the assessee's case. However, as pointed out by us earlier, this Court in Jacabs case proceeded on the assumption that the facts in Mitsubishi Corporation were similar to those in Jacabs. That assumption, as we have earlier demonstrated, with respect, is not borne out by the facts.

26. It further seems to us inequitable that the assessee, who accepted the tax liability after initially denying it, should be permitted to shift the responsibility to the Indian payers for not deducting the tax at source

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from the remittances, after leading them to believe that no tax was deductible. The assessee must take responsibility for its *volte face*. Once liability to tax is accepted, all consequences follow; they cannot be avoided. After having accepted the liability to tax at the first appellate stage, it is unfair on the part of the assessee to invoke section 201 and point fingers at the Indian payers. The argument advanced by the learned counsel for the assessee that the Indian payers failed to deduct tax at their own risk seems to us to be only an argument of convenience or despair. As we have pointed out earlier, it is difficult to imagine that the Indian telecom equipment dealers of the assessee would have failed to deduct tax at source except on being prompted by the assessee. It may be true that the general rule is that equity has no place in the interpretation of tax laws. But we are of the view that when the facts of a particular case justify it, it is open to the court to invoke the principles of equity even in the interpretation of tax laws. Tax laws and equity need not be sworn enemies at all times. The rule of strict interpretation may be relaxed where mischief can result because of the inconsistent or contradictory stands taken by the assessee or even the revenue. Moreover, interest is, inter alia, compensation for the use of the money. The assessee has had the use of the money, which would otherwise have been paid as advance

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tax, until it accepted the assessments at the first appellate stage. Where the revenue has been deprived of the use of the monies and thereby put to loss for no fault on its part and where the loss arose as a result of vacillating stands taken by the assessee, it is not expected of the assessee to shift the responsibility to the Indian payers. We are not to be understood as passing a value-judgment on the assessee's conduct. We are only saying that the assessee should take responsibility for its actions.

27. It is not unusual for the courts to invoke equitable considerations even while interpreting tax laws. In ***Jodha Mal Kuthiala v. CIT*** **: (1971) 82 ITR 570 (SC)**, Hegde, J., opined thus: "*It is true that equitable considerations are irrelevant in interpreting tax laws. But, those laws, like all other laws, have to be interpreted reasonably and in consonance with justice*". In ***CIT v. J.H. Gotla*** **: (1985) 156 ITR 323 (SC)**, it was held by the Supreme Court that though equity and taxation are often strangers, attempts should be made (to ensure) that they do not always remain so and if a construction results in equity rather than injustice, that should be preferred to the literal or strict construction. In ***Calcutta Jute Manufacturing Co. v. Commercial Tax Officer*** **: (AIR 1997 SC 2920)** the Supreme Court held that if there is a provision in a taxing statute to compensate the state by charging interest, that provision need not be

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strictly construed but may be so construed as to effectuate its purpose. The Court held:

> "*10. The State is empowered by the legislature to raise revenue through the mode prescribed in the Act so the State should not be the sufferer on account of the delay caused by the taxpayer in payment of the tax due. The provision for charging interest would have been introduced in order to compensate the State (or the Revenue) for the loss occasioned due to delay in paying the tax (vide* ***Commr. of Income-tax A.P. v. M. Chandra Sekhar*** **: 1985 (1) SCC 283 :** ***(AIR 1985 SC 114)*** *and* ***Central Provinces Manganese Ore Co. Ltd. v. Commr. of Income-tax*** **: 1986 (3) SCC 461 :** ***(AIR 1987 SC 438)****. When interpreting such a provision in a taxing statute a construction which would preserve the purpose of the provision must be adopted. It is well-settled that in interpreting a taxing statute normally, there is no scope for consideration of principles of equity. It was so said by Rowlatt J. in* ***Cape Brandy Syndicate v. Inland Revenue Commissioners*** **: (1921) 1 KB 64 at page 71***:
>
> > "*In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.*"
>
> *The above observation has been quoted with approval by a Bench of three Judges of this Court in* ***Commissioner of Income-tax Madras v. Ajax Products Ltd.*** **: 55 ITR 741: (AIR 1965 SC 1358)***. In another decision rendered by a*

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Bench of three Judges of this Court in ***State of Tamil Nadu v. M. K. Kandaswami*** **: *36 STC 191 : (AIR 1975 SC 1871)*** *It has been observed thus:*

> "*In interpreting such a provision, a construction which would defeat its purpose and, in effect, obliterate it from the statute book should be eschewed. If more than one construction is possible, that which preserves its workability and efficacy is to be preferred to the one which would render it otiose or sterile.*"

> *11. We are, therefore, not adopting a construction which would upset or even impair the purpose in introducing Section 10A in the Act. The return to be filed by the dealer is the full and correct return as referred to in Section 10 and on failure to furnish such a return the liability to pay interest from the prescribed date would arise when assessment is completed.*"

28. We think that the present case is one where such considerations should prevail in the interpretation of section 234B; otherwise, it will not merely result in injustice but the purpose of the provision would not have been achieved. In any case, the facts of the present case are different, as we have earlier pointed out, from the facts obtaining in ***Jacabs (supra)*** and therefore the said decision cannot be applied.

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29. For the aforesaid reasons we answer the substantial question of law framed by us in the affirmative, against the assessee and in favour of the revenue. The appeals are allowed.

R.V.EASWAR, J

BADAR DURREZ AHMED, J

November 7, 2013
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HIGH COURT OF DELHI
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